IN THE HIGH COURT OF KERALA AT ERNAKULAM

PRESENT :

THE HONOURABLE MR. JUSTICE K.PADMANABHAN NAIR

TUESDAY, THE 4TH SEPTEMBER 2007 / 13TH BHADRA 1929

AS.No. 315 of 1992()

OS.12/1988 of ADDL.SUB COURT, ALAPPUZHA
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APPELLANTS - PLAINTIFFS :
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1. **C.N. KSHEERAPANI, S/O.NEELAKANDAN, KADAVATHU HOUSE, PATHIRAPPALLY, M.S. P.O. ALAPPUZHA, MEMBER, SNDP YOGAM BY BECOMING MEMBER IN SNDP BRANCH NO.617.**

2. **N.E. SUDHAKARAN, S/O. KUNJAN, 'S.VIHAR', SOUTH ARYAD, ALAPPUZHA MEMBER OF SNDP YOGAM BY BECOMING MEMBER IN BRANCH NO.830.**

ADDITIOINAL APPELLANTS:
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3. **V. VIDYADHARAN, AGED 75 YEARS, S/O. VELAYUDHAN, VIDYABHAVAN (NILAM NIKARTHIL) AVALOOKKUNNU P.O., ALAPPUZHA - 6, MEMBER OF SNDP BRANCH NO.298.**

4. **K.S. SADANANDAN, AGED 76 YEARS, KOCHERUKKAN VELI, AVALOOKKUNNU P.O., ALAPPUZHA - 6, MEMBER OF SNDP BRANCH NO.298.**

ADDITIONAL APPELLANTS 3 AND 4 ARE IMPLEADED AS PER ORDER DATED 10.7.2007 IN I.A. NO. 3695 OF 2006.

BY ADV. SRI.T.SETHUMADHAVAN
SRI.PUSHPARAJAN KODOTH
SRI.K.JAYESH MOHANKUMAR

RESPONDENTS - DEFENDANTS :
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1. **A.S. PRATHAPA SINGH, SECRETARY, SNDP YOGAM, KOLLAM.**

2. N.K. NARAYANAN, PRESIDENT, SAHODARAN SMARAKA TRUST, KIDANGAMPARAMBU ALAPPUZHA (DIED).

3. N.K. NARAYANAN, KURATHIPRAMBU, CHETTICAD, M.S.P.O. ALAPPUZHA.

4. K.P. MUKUNDAN, ADVOCATE, KALLUKATTU HOUSE, PUNNAPRA, ALAPPUZHA.

5. T.D. VIDYANANDAN, KALARICKAL PUTHENVEEDU, TRIPPADAPURAM JUNCTION, ARYAD, ALAPPUZHA.

ADDITIONAL RESPONDENTS IMPLEADED

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6. KALAVOOR N.GOPINATH, PRESIDENT, SAHODARAN SMARAKA TRUST, VELIKKAKATHU VEEDU, VADAKKANARYAD MURI, MANNANCHERRY VILLAGE, AMBALAPUZHA TALUK, ALAPPUZHA DISTRICT.

7. K.N. PREMANANDAN, SECRETARY, DO. TRUST, KURATHUPARAMBU VEEDU, CHETTIKKATTU MURI, PATHIRAPPILLY VILLAGE, ALAPPUZHA.

8. G. RAJU, S/O. GANGADHARAN, TREASURER, SAHODARAN SMARAKA TRUST, THAKIDIYIL VEEDU, LAJANATH WARD, ALAPPUZHA VILLAGE, ALAPPUZHA DISTRICT.

9. DR. K.P. YOHANNAN, MANAGING TRUSTEES, BELIEVERS CHURCH SCHOOL, KUTIPPUZHA THIRUVALLA, PATHANAMTHITTA DISTRICT.

IT IS RECORDED THAT R2 DIED AND THE APPELLANTS DOES NOT WANT TO IMPLEAD THE PERSONAL HEIERS OF R2 AS PER ORDER DATED 30.11.1998 VIDE STATEMENT CF.17847/98.

ADDITIONAL RESPONDENTS 6 TO 9 ARE IMPLEADED AS PER ORDER DATED 31.7.2007 IN I.A. NO.4804 OF 2007

BY ADV. SRI.G.JANARDHANA KURUP (SR.)
SRI.JOHN K.GEORGE
SRI.R.HARIKRISHNAN
SRI.SUDHEENDRAN. K.Y.
SMT.R.REMA

THIS APPEAL SUITS HAVING BEEN FINALLY HEARD ON 04/09/2007, THE COURT ON THE SAME DAY DELIVERED THE FOLLOWING:

ORDER ON I.A. NO. 1216 OF 2007 IN

A.S. NO. 315 OF 1992

DISMISSED.

4.9.2007 **ID/- K. PADMANABHAN NAIR, JUDGE.**

K. PADMANABHAN NAIR, J.

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A.S. NO. 315 OF 1992

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Dated this the 4th day of September, 2007

J U D G M E N T

This appeal arises from the decree and judgment passed in O.S. No.12 1988 on the file of the Sub Court, Alappuzha by which the trial court had dismissed the suit filed by the plaintiffs.

2. Plaintiffs filed the suit alleging that they were members of Branch Nos.617 and 830 that comes within the territorial limits of SNDP Union, Ambalapuzha and first defendant SNDP Yogam. The material averments are as follows: The SNDP Union is defined under Rules 2(h) of the Articles of the SNDP Yogam. Rule 14 of the bye-laws of the Yogam provides for formation of Branches and Unions in accordance with the bye-laws. Clause No.3 of the bye-laws framed under Rule 14 says that the Union is an Association of the Branches of the SNDP Union. All the assets of the Union including plaint schedule property and Branches are under the control of the SNDP Yogam. The SNDP Union is registered with SNDP Yogam

which is a Company registered under the Companies Act, 1882. But SNDP Yogam is not a Company having share capital. Some of the members of the Union and Sakhas registered a private Trust styled as "Sahodaran Smaraka Trust" arrayed as second defendant in the suit. The Trust was formed to promote the objects of the SNDP Yogam through the Union. Membership of the Trust was not confined to persons who are members of the SNDP Union and SNDP Yogam. The Trust has got a dual character. It is the custodian of the assets of SNDP Union and in relation to plaint schedule property, its office bearers in whose name the plaint schedule property was purchased stand in the fiduciary capacity of trustees. The suit properties were purchased with the funds of Ambalapuzha SNDP Union in 1986 in the name of defendants 3 to 5. In the year 1987 four sale deeds were registered by the second defendant in favour of the SNDP Union for 81 cents but refused to execute documents for the remaining extent of the property. Defendants 3 to 5 who were trustees of the second defendant Trust acted against the interest of the SNDP

Union and Yogam and claimed exclusive right over the suit property. Hence the suit for the following reliefs:

> "(a) This court be pleased to declare that the plaint schedule property is a Trust created by the SNDP Union for the benefit of its members and also members of the Sakhas within its territorial limits.
>
> (b) That defendants 3 to 5 were constituted as Trustees of plaint schedule property by virtue of sale deed 3519/86 of the Alleppey Sub Registry Office.
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> (c) That 2nd defendant 'Sahodaran Smaraka Trust' has no manner of right, title, or interest in the suit property.
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> (d) That plaintiffs are eligible to be appointed as Trustees and be appointed as Trustees.
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> (e) After appointing plaintiffs as Trustees they may be allowed to be in possession of the properties scheduled as Trustees and
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> (f) Such other reliefs as are incidental and consequential to reliefs 'A' to 'E' may also be granted".

3. First defendant filed a separate written statement raising the following contentions. The suit was not maintainable. The SNDP Union is only a

supervisory body of the Sakhas coming under a defined territory. It was admitted that the SNDP Yogam is a Company registered under the Companies Act and hence the civil court has no jurisdiction to enquire into the facts alleged and interfere with the administration of the Company. Plaintiffs are only two shareholders of the first defendant Company and they are not competent to dictate or direct the policies and actions of the Board of Directors.

4. Defendants 3 to 5 filed a written statement. It was contended that the second defendant Trust mentioned in the plaint is a Public Religious, Charitable and Educational Trust. Since one of the reliefs sought for in the plaint was to appoint the plaintiffs as trustees of the Trust, the suit is barred under Section 92 of the Code of Civil Procedure as no leave of court was obtained. The declaration sought for in the plaint that the plaint schedule property is Trust created by the SNDP Union for the benefits of its members and Sakhas cannot be granted as prayed for, as such a prayer is hit by the provisions of the Benami Transactions

(Prohibition) Act, 1988. Neither the Union nor the Sakhas had any right over the suit property. The Trust was created with the object of removing illiteracy among the public by establishing educational institutions and for promoting public health by establishing hospitals and other public health institutions. The averment that the Trust was brought into existence to further the objects of the SNDP Union and Yogam was denied. The Trust is an independent body which was not an organ formed by the Yogam or Union. There was no fiduciary relationship between the SNDP Union and the Trust. The suit property was purchased by the Trust and the Trust is administered by an independent body of trustees which do not owe any allegiance either to the SNDP Union or SNDP Yogam. On 12.5.1986 the SNDP Union had entered into an agreement with the Indian Evangelical Lutheran Church Trust Association and an amount of Rs.1,00,000/- was paid as advance. But subsequently, the Union found it difficult to purchase the suit property. The second defendant Trust agreed to purchase the same and amount paid as advance was

treated as loan to the second defendant Trust. The Trust purchased the suit property on 7.11.1986. The amount advanced by the Union was repaid by the Trust. The amounts borrowed by the Trust from the public were also repaid. Neither the Union nor the Yogam has any right over the property. The prayer to remove defendants 3 to 5 from the Trust was opposed. Plaintiffs were described as recalcitrant members of the SNDP Union not eligible to be appointed as trustees. It was alleged that the suit was filed with ulterior motives. Hence they prayed for dismissal of the suit.

5. The trail court found that the suit was bad for non-joinder of necessary parties. It was also found that the suit was hit by Section 92 CPC and by the provisions of Benami Transactions (Prohibition) Act. On the above findings, the trial court dismissed the suit. Challenging the decree and judgment, this appeal is filed.

6. Learned counsel appearing for the appellants has argued that there was no contention of non-joinder of necessary parties and it is settled position of law that no suit can be dismissed on the ground of non-joinder of

necessary parties. It is argued that if a contention of non-joinder of necessary parties is raised, it is to be decided as a preliminary issue. It is argued that the court below had relied on a decision rendered in Parvathy Bhagini v. Kesavan Velukutty (1988 (1) KLT 803) which was subsequently overruled by the decision of the Apex Court. It is argued that the provisions of the Benami Transactions (Prohibition) Act has no retrospective operation and that finding is also liable to be set aside. It is argued that a reading of the prayers in the plaint would show that provisions of Section 92 CPC can have application to the facts of the case.

Learned counsel appearing for the respondents strenuously argued before me that the first relief prayed for in the suit is that the suit property is the Trust created by the SNDP Union for the benefits of its members. It is argued that such a relief can be sought for only by the SNDP Union. It is argued that appellants are only members of the Union and they have no case that SNDP Union is colluding with the defendants and acting against the interest of the

members of the Union. It is argued that no relief can be granted to the appellants and the frame of suit is bad. It is argued that the second prayer is for a declaration that defendants 3 to 5 are to be declared as trustees. It is argued that no person can be declared as trustee of a landed property and a person can be declared only as trustee of a Trust. The Trust may or may not own land properties. It is argued that civil court has no jurisdiction to appoint a person as a trustee.

7. I shall first consider whether the suit is hit by the provisions of the Benami Transactions (Prohibition) Act. It is true that in Kesvan Velukutty's case (supra) it was held that the provisions of the Act has retrospective operation. But in R.Rajagopal Reddy v. Padmini Chandrasekharan (1995) 2 SCC 630) a three Judges Bench of the Supreme Court held that the provisions of the Act have no retrospective operation. Transactions involved in this case were effected prior to the commencement of the Act. In fact the suit was also filed before the commencement of the Act. Section 3(5) and (8) of the Act came into existence with effect from

5.9.1988 and the remaining provisions with effect from 19.5.1989. Suit was filed on 29.1.1988. So the provisions of the Act have no application to the facts of this case. Hence the finding of the trial court that the suit is hit by the provisions of the Act is not correct.

8. Now I shall consider how far the view taken by the trial court that there is a bar under Section 92 CPC. In Biswanth v. Radha Ballabji (AIR 1967 SC 1044) it was held that to invoke Section 92 CPC three conditions are to be satisfied. It was held as follows:

> **"It is settled law that to invoke S.92 of the Code of Civil Procedure, 3 conditions have to be satisfied, namely, (i) the trust is created for public purposes of a charitable or religious nature; (ii) there was breach of trust or a direction of Court is necessary in the administration of such a trust; and (iii) the relief claimed is one or other of the reliefs enumerated therein. If any of the 3 conditions is not satisfied, the suit falls outside the scope of the said section".**

9. In this case the first relief sought for is a declaration that the suit property is a Trust created by the SNDP Union for the benefits of its members. Appellants also sought for a declaration that defendants

3 to 5 are the trustees of the suit property by virtue of sale deed No.3519/1986. These two reliefs will not come within the scope of Section 92 CPC.

10. Learned counsel appearing for the respondents has argued that the very relief sought for in the plaint is for a declaration that the property is a Trust. It was argued that property alone cannot be found to be subject matter of the Trust. It is argued that there may be Trusts even without any property at all. It is argued that one of the prayers in the suit is that the appellants are eligible to be appointed as trustees. It is argued that the prayer itself is vague and it is not possible to grant any such relief and it is not clear whether the appellants seek a declaration that they are the trustees of the SNDP Union or the second defendant Sahodaran Smaraka Trust. It is argued that no court can declare a person as trustee of any particular Trust. In the plaint itself it was admitted that the SNDP Union is having its own bye-laws and rules of procedure for election of office bearers of the SNDP Union as well as the SNDP Yogam. The appellants themselves have

produced bye-laws of the second defendant Trust which provides for granting membership to persons. It is argued that no court can compel the second defendant Trust to admit a person as a member of the Trust and it is for the Trust to admit a member. It is argued that the trial court has not considered any of these aspects on its merits. It is argued that the trial court simply held that there is a bar under Section 92 CPC. It is seen that both sides had adduced evidence but the case was not considered on its merits.

11. Going by the averments in the plaint, it is clear that the suit is not barred under Section 92 CPC. The question to be considered is whether the property scheduled in the plaint belongs to SNDP Union or belongs to the second defendant. If the same belongs to the Trust exclusively, the further question that arises for consideration is whether the plaintiffs can compel a civil court to declare that they are eligible to be elected as trustees.

12. The next question arising for consideration is whether the suit is bad for non-joinder of necessary

parties. Learned counsel has relied on a decision reported in Chandra Mohan v. Union of India (AIR 1953 Assam 192) and argued that the very first relief is that the suit property is the property of a Trust created by the SNDP Union. It is argued that Union is not made as a plaintiff or defendant and without SNDP Union in the party array no such declaration can be granted. In Chandra Mohan's case (supra) one of the defendants impleaded was the Railway Administration, represented by its Manager, even though Railway was owned by Union of India. Trial court decreed the suit. Before the appellate court it was argued that there was non-joinder of necessary parties. Appellate court remanded the case giving an opportunity to the plaintiff to implead necessary parties. In that case, High Court took the view that it is not a case of non-joinder of parties, but it is a case where necessary party to the suit is not before the court and hence no relief can be granted. In the case on hand no such contention was raised.

13. In this case the finding of the court below is

that the suit is bad for non-joinder of parties. There is no finding to the effect that relief cannot be granted to the plaintiffs without the SNDP Union on the party array and hence the frame of suit was bad. Learned counsel for the respondents has argued that plaintiffs are two ordinary members of the Union and they have no right to file a suit on behalf of the Union. It is argued that to file a suit in the name of Union there is provisions in the bye-laws and no wayfarer can come and file a suit; in the name of the Union.

14. The trial court has not considered the question whether an effective relief can be granted without the Union on the party array. It has also not considered whether the appellants are entitled to file a suit claiming reliefs for the SNDP Union. So, I have no other option, but to set aside the decree and judgment and remand the matter to the trial court for fresh consideration. I make it clear that I am not expressing any opinion regarding the merits of the contentions raised and all those points are left open to be decided on merits.

15. Learned counsel for the respondents argued that this Court itself can consider whether effective reliefs can be granted to the appellants in the absence of the Union on the party array as held in Chandra Mohan's case (supra) and it is not necessary to remand the suit to the trial court for that purpose alone. I do not think I will be justified in considering the question on merits since no such contention was raised in the written statement, no issue was raised and no decision was rendered on that point. I make it clear that the respondents can raise all contentions raised before this Court before the trial court.

16. In the result, the appeal is allowed. The decree and judgment passed by the trial court is hereby set aside. It is found that the suit is not barred under the provisions of the Benami Transactions (Prohibition) Act, 1988 and Section 92 CPC. The suit is remanded for fresh disposal in accordance with law regarding other issues arising for consideration in the suit. I once again make it clear that I am not expressing any opinion

regarding the contentions raised by both parties on merits.

Parties shall appear before the trial court on 22.10.2007. Since the suit is of the year 1988, the learned Sub Judge shall make every endeavour to dispose of the suit as expeditiously as possible, at any rate, within five months from the date of appearance of the parties.

K. PADMANABHAN NAIR, JUDGE.

vsv

K. PADMANABHAN NAIR, J.

A.S. NO. 315 OF 1992

J U D G M E N T

TH SEPTEMBER, 2007